

EXHIBIT 8
Part 1 of 2

B197875

Name Santiago Montenegro
 Address P.O. Box 705/ND-12-L
CTF North Facility
Soledad, CA 93960-0705
 CDC or ID Number H-55090

MC-275

COURT OF APPEAL-SECOND DIST.

FILED

APR - 2 2007

JOSEPH A. LANE Clerk
WERNER I. SALAS Deputy Clerk

IN THE COURT OF APPEAL
 SECOND APPELLATE DISTRICT
 (Court)

PETITION FOR WRIT OF HABEAS CORPUS

B197875

Santiago Montenegro
 Petitioner
 vs.
Ben Curry: et., al;
 Respondent

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
 - If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

- | | |
|--|--|
| <input type="checkbox"/> A conviction | <input checked="" type="checkbox"/> Parole |
| <input type="checkbox"/> A sentence | <input type="checkbox"/> Credits |
| <input type="checkbox"/> Jail or prison conditions | <input type="checkbox"/> Prison discipline |
| <input type="checkbox"/> Other (specify): _____ | |

1. Your name: Santiago Montiago
2. Where are you incarcerated? Correctional Training Facility, Soledad, California
3. Why are you in custody? Criminal Conviction Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Second degree murder / With use of a handgun

- b. Penal or other code sections: Penal Code 187 (a) / Penal Code 12022.5
- c. Name and location of sentencing or committing court: Santa Barbara Superior Court P.O. Box 21107 Santa Barbara, CA. 93101
- d. Case number: SMO73867
- e. Date convicted or committed: October 30, 1992
- f. Date sentenced: October 30, 1992
- g. Length of sentence: 15 years to life
- h. When do you expect to be released? Unknown
- i. Were you represented by counsel in the trial court? Yes. No. If yes, state the attorney's name and address:
David Ogren Public Defender County of Santa Barbara 3rd Flr Santa Barbara, CA. 93101
4. What was the LAST plea you entered? (check one)
 Not guilty Guilty Nolo Contendere Other: _____
5. If you pleaded not guilty, what kind of trial did you have?
 Jury Judge without a jury Submitted on transcript Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

SEE ATTACHED PETITION

- a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (*when*) or place (*where*). (*If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.*)

SEE ATTACHED PETITION

- b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

SEE ATTACHED PETITION

7. **Ground 2 or Ground** _____ (*if applicable*):

SEE ATTACHED PETITION

- a. Supporting facts:

SEE ATTACHED PETITION

- b. Supporting cases, rules, or other authority:

SEE ATTACHED PETITION

8. Did you appeal from the conviction, sentence, or commitment? Yes. No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

Second Appellate District, Division Six

b. Result: JUDGMENT AFFIRMED

c. Date of decision: May 28, 1993

d. Case number or citation of opinion, if known: B072387

e. Issues raised: (1) Counsel filed a statement pursuant to People v. Wende

(2) No issues were raised

(3) _____

f. Were you represented by counsel on appeal? Yes. No. If yes, state the attorney's name and address, if known:

Gilbert W. Lentz 1114 State Street, Suite 240 Santa Barbara, CA 93101

9. Did you seek review in the California Supreme Court? Yes. No. If yes, give the following information:

a. Result: _____

b. Date of decision: _____

c. Case number or citation of opinion, if known: _____

d. Issues raised: (1) _____

(2) _____

(3) _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

N/A

b. Did you seek the highest level of administrative review available? Yes. No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? Yes. If yes, continue with number 13. No. If no, skip to number 15.

13. a. (1) Name of court: _____

(2) Nature of proceeding (for example, "habeas corpus petition"): _____

(3) Issues raised: (a) _____

(b) _____

(4) Result (Attach order or explain why unavailable): _____

(5) Date of decision: _____

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result (Attach order or explain why unavailable): _____

(5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

No Delays

16. Are you presently represented by counsel? Yes. No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? Yes. No. If yes, explain:

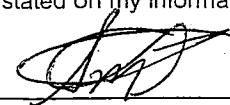
18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

This Court has original jurisdiction

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

3-23-07


(SIGNATURE OF PETITIONER)

1 Santiago Montenegro
P.O. Box 705/ND-12-L
2 CTF North Facility
Soledad, CA 93960-0705

3
4 In Propria Persona

5
6
7
8 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
9
10 SECOND APPELLATE DISTRICT

11 IN RE: SANTIAGO MONTENEGRO

CASE NO. _____

12 PETITIONER

PETITION FOR WRIT OF HABEAS
CORPUS AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF.

13
14 ON HABEAS CORPUS

15
16
17 ON APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

18 TO: THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL, SECOND
19 APPELLATE DISTRICT AND THE ASSOCIATE JUSTICE.

20
21 Santiago Montenegro, (hereafter petitioner) In Propria Persona
22 hereby petitions this Honorable Court for Writ Of Habeas Corpus fol-
23 owing the decision of the Superior Court of Santa Barbara County.
24

25 //

26 //

27 //

28 //

1 Santiago Montenegro, H-55090
2 P.O. Box 705/ND- 12-L
3 CTF North Facility
4 Soledad, CA. 93960-0705

5
6
7
8 In Propria Persona
9
10
11

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

12 IN RE: SANTIAGO MONTENEGRO

13 CASE NO. _____
14 PETITIONER

PETITION FOR WRIT OF HABEAS
CORPUS AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF.

ON HABEAS CORPUS

15
16
17 TO: THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL, SECOND
18 APPELLATE DISTRICT AND TO THE HONORABLE ASSOCIATE JUSTICE.
19

20 Comes Now Santiago Montenegro (hereafter petitioner) In Propria
21 Persona. Petitioner is unlawfully restrained of his liberty. This
22 petition is intended to give meaning to Santiago Montenegro's sentence
23 of 15 years to life for second degree murder - by seeking to overturn
24 the Board of Parole Hearings "Illegal And Unconstitutional" decision
25 refusing to grant him parole for the (2nd) time since becoming eligible
26 for parole on January 4, 2003.
27
28

1 Under the parole statute (penal code section 3041, amended 1976, c.
2 1139), parole is now the norm rather than the exception. (penal code
3 section 3041 (a), the board "shall" normally set a parole release date
4 at the initial hearing". A life prisoner must have a release date set
5 when his release would not pose a danger to the public. (penal code
6 section 3041 (b)). That determination must be based on criteria set
7 forth in the Penal Code. The Board is given latitude to formulate
8 criteria implementing the statutory mandate. (Penal Code Section
9 5076.2). However, this criteria is limited to the parameters estab-
10 lished by statute and legislative intent. (Terhune v. Superior Court,
11 65 cal. App. 4th 864, 872-873 (1998)).

12 In the case of this petitioner, there is "No Evidence" in the
13 record to support the Board's denial of parole at his (2nd) parole
14 hearing. The court is asked to issue a formal "Order To Show Cause"
15 and require the respondent to present to the court justification for
16 the Board's decision in this case. The court is asked to find the
17 decision violated due process of law and order the Board to set
18 this petitioner's parole release date. The court is also asked to
19 declare the rights of the parties under the Due Process and Equal
20 Protection Clauses, in regards to the Board's interpretation of
21 Section 3041, Penal Code, and to issue habeas relief accordingly.

22 Generally, Petitioner asserts that he is being subjected to an
23 unconstitutional condition in the determination of his parole appli-
24 cations because the Board of Parole Hearings has been operating out-
25 side the law pursuant to a policy against granting paroles, such that
26 the parole statute has been and currently is misinterpreted to the
27 extent that petitioner has been deprived all substantive due process
28 protections of the law including his federally protected liberty in-

1 terest to parole. Petitioner asserts, within this context, that the
2 Board has been found to be operating pursuant to a "No" parole policy
3 which reduces parole hearings to pro forma sham hearings where parole
4 commissioners are precluded by this policy (and their own abiding an-
5 imus) from being fair or impartial, which violates substantive due
6 process of law.

7
8 11.

9 PARTIES

10 PETITIONER, SANTIAGO MONTENEGRO, CDC#H-55090 is a prisoner of the
11 State of California, incarcerated at the Correctional Training Facility
12 Soledad, California.

13 RESPONDENT, BEN CURRY, is the Warden of the Correctional Train-
14 ing Facility Soledad, California and is the legal custodian of the
15 petitioner

16
17 111.

18 STATEMENT OF THE CASE

19 Preliminary formalities (HT 1). 1/ (Exhibit 1, transcript of
20 parole hearing conducted on August 16, 2006).

21 Santiago Montenegro (hereafter petitioner) was received by the
22 California Department of Corrections & Rehabilitation (CDCR) 11/06/92
23 from Santa Barbara County for the offense of murder 2nd with use of a
24 firearm. He is sentenced to an indeterminate term of 17 years to life.
25 Case number SM073867. His Minimum Eligible Parole Date (MEPD) is set
26 for February 3, 2003.

27
28 1. References to the parole hearing transcripts will be indicated by
HT followed by page number, i.e., (HT 0).

COMMITMENT OFFENSE

The following are statements taken from the petitioner's probation officer report dated October 21, 1992. (See Exhibit 2 at p.2-3).

On November 13, 1985, Santa Maria Police Officers responded to El Conquistador Bar, 210 S. Blosser, Santa Maria, to investigate a shooting. Officers found Antonio Hernandez Cardona, age 22, slumped in the right front passenger seat of an automobile. Officers observed a gun shot wound in the front of his neck, an ambulance was called and he was taken to Marian Medical Center where he died at 2315 hours. Doctors concluded the victim died as a result of a gun shot wound to the anterior neck/chest, exiting through the back. A second entry wound in the left shoulder revealed a .44 caliber bullet. The victim was shot three times.

Investigation revealed the victim was the alleged boyfriend of Liliana Beltran, and they had been inside the El Conquistador Bar. Ms. Beltran left the bar and went outside to the victim's car. The defendant followed Ms. Beltran out to the car, sat down in the car and tried to kiss her. The victim came out of the bar with two friends, saw what was going on and pulled the defendant out of the car. The victim and defendant verbally argued, the defendant pulled a .44 magnum pistol from his waistband, and fired three or four shots, killing the victim. The defendant fled the area.

The defendant told officers upon his arrest, he had hidden in a cardboard box in an alley until day light, had been in Reedley, California, Tijuana, Mexico and for the past two years had been living in Guadalupe.

1 BOARD FINDINGS

2 In the matter of Santiago Montenegro, CDC number H-55090.
3 The panel reviewed all the information received from the
4 public and relied on the following circumstances in con-
5 cluding that the prisoner is not suitable for parole and
6 would pose an unreasonable risk to society or a threat to
7 public safety if released from prison.

8 The offense was carried out in an especially callous manner,
9 and the motive for the offense was very trivial in relation
10 to the offense.

11 MENTAL HEALTH EVALUATION

12 The psychological report by Dr. William Gamard, Ph.D is supportive of
13 parole pursuant to Penal Code Section 5079. (see Exhibit 3 at pp.4-6).

14 CURRENT DIAGNOSTIC IMPRESSIONS:

- 15 Axis I: No contributory.
16 Axis II: No contributory.
17 Axis III: No contributory.
18 Axis IV: Incarceration.
19 Axis V: GAF equals 85.

20 Should this inmate at this time be given a parole or release
21 date his prognosis for maintaining his present gains in the community
22 is excellent.

23 ASSESSMENT OF DANGEROUSNESS:

- 24 A. This inmate has not received any CDC-115 violations
25 for violent behavior during his entire incarceration
26 of 16 years. He only had one CDC-115, whis was on
27 March 6, 2002 for refusing to work. Therefore, it is
28 felt that he would pose a less than average risk for
 violence when compared with this Level Two inmate
 population.

1 B. If released to the community his violence potential is
2 estimated to be no higher than the average citizen in
3 the community. This based upon the following consider-
4 ations: there is no evidence of any previous violent
5 behavior, or violent behavior since his offense. There
6 was no history of prior arrest other than one DUI. Al-
7 though he did flee the scene of the crime, evaded arrest
8 for six years, and formerly appeared to lack remorse for
9 his crime, he has since accepted full responsibility for
10 his offense.

11 CLINICIAN OBSERVATIONS/COMMENTS/RECOMMENDATIONS:

- 12 A. This inmate is responsible for his behavior. He has the
13 ability to abide by institutional standards and has done
14 so during his incarceration period.
15 B. This inmate has no mental health disorder, which would
16 necessitate treatment either during his incarceration
17 period or following parole.
18 C. Since this inmate denies having any alcohol or drug
19 problem, no recommendations are made in this area.

20 IV.

21 EXHAUSTION OF ADMINISTRATIVE REMEDIES

22 Petitioner filed this petition in the superior Court in the first
23 instance inasmuch as the Board of Parole Hearings no longer provides
24 for administrative appeals.
25

26 V.

27 VERIFICATION

28 I am the petitioner in this action. All facts in the above doc-
1 uments, not otherwise supported by citation to the record, exhibits, of
2 other documents, are true of my own personal knowledge. I declare
3 under penalty of perjury that the foregoing is true and correct and
4 that this declaration was executed on this date 3/23/07, at the
5 Correctional Training Facility at Soledad, California.



Santiago Montenegro

VII.

CRITERIA FOR PAROLE

The "unreasonable risk" requirement is the standard required by statute (3041,subd,[b]), and by the Board regulations in order to justify a denial of parole. (CCR 15. 2402,subd [a]), Section 3041,(a), Penal Code requires, in pertinent part:

One year prior to the inmates minimum eligible parole date a panel consisting of at least two commissioners of the Board Of Parole Hearings shall again meet with the inmate and normally set a parole release date as provided in section 3041.5. The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to public.... Subd. [b] of section 3041 provides in pertinent part, that: the panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, is such that consideration of public safety requires a more lengthy period of incarceration of this individual, and that a parole date, therefore, cannot be fixed at this meeting.

TITLE 15, DIVISION 2, BOARD REGULATIONS2402. DETERMINATION OF SUITABILITY.

- (a) General. The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison. (emphasis added).
- (b) Information Considered. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community;

1 and any other information which bears on the prisoner's
2 suitability for release. Circumstances which taken al-
3 lone may not firmly establish unsuitability for parole
may contribute to a pattern which results in a finding
of unsuitability.

4 (c) Circumstances Tending To Show Unsuitability. The follow-
5 ing circumstances each tend to indicate unsuitability
for release. These circumstances are set forth as guide-
6 lines; the importance attached to any circumstances or
combination of circumstances in a particular case is left
7 to the judgment of the panel. Circumstances tending to
indicate unsuitability include:

8 (1) Commitment Offense: The prisoner committed the offense
9 in an especially heinous, atrocious or cruel manner. the
factors to be considered include:

10 (A) Multiple victims were attacked, injured or killed in the
same or separate incidents.

11 (B) The offense was carried out in a dispassionate and cal-
12 culated manner such as an execution-style murder.

13 (C) The victim was abused, defiled or mutilated during or
after the offense.

14 (D) The offense was carried out in a manner which demonstra-
15 tes an exceptionally callous disregard for human suffering.

16 (E) The motive for the crime is inexplicable or very trivial
in relation to the offense.

17 (2) Previous Record Of Violence. The prisoner on previous
18 occasions inflicted or attempted to inflict serious in-
19 jury on a victim, particularly if the prisoner demon-
strated serious assaultive behavior at an early age.

20 (3) Unsuitable Social History. The prisoner has a history of
unsuitable or tumultuous relationships with others.

21 (4) Sadistic Sexual Offenses. The prisoner has previously
22 sexually assaulted another in a manner calculated to
inflict unusual pain or fear upon the victim.

23 (5) Psychological Factors. The prisoner has a lengthy history
24 of severe mental problems related to the offense.

25 (6) Institutional Behavior. The prisoner has engaged in ser-
ious misconduct in prison or jail.

1 (d) Circumstances Tending To Show Suitability. The following
2 circumstances each tend to show that the prisoner is su-
3 itable for release. The circumstances are set forth as
4 general guidelines; the importance attached to any circ-
5 umstances or combination of circumstances in a particular
6 case is left to the judgment of the panel. Circumstances
7 tending to indicate suitability include:

- 8 (1) No Juvenile Record. The prisoner does not have a record
9 assaulting others as a juvenile or committing crimes with
10 a potential of personal harm to victims.
- 11 (2) Stable Social History. The prisoner has experienced rea-
12 sonably stable relationships with others.
- 13 (3) Signs Of Remorse. The prisoner performed acts which tend
14 to indicate the presence of remorse, such as attempting
15 to repair the damage, seeking help for or relieving su-
16 ffering of the victim, or indicating that he understands
17 the nature and magnitude of the offense.
- 18 (4) Motivation For Crime. The prisoner committed his crime as
19 the result of significant stress in his life, especially
20 if the stress has built over a long period of time.
- 21 (5) Battered Woman Syndrome. (Not quoted here as inapplicable).
- 22 (6) Lack Of Criminal History. The prisoner lacks any signif-
23 icant history of violent crime.
- 24 (7) Age. The prisoner's present age reduces the probability
25 of recidivism.
- 26 (8) Understanding and Plans for Future. The prisoner has made
27 realistic plans for release or has developed marketable
28 skills that can be put to use upon release.

VIII.

PRAYER FOR RELIEF

Santiago Montenegro states that he has no other plain or speedy remedy save habeas corpus: therefore, he prays this Honorable Court:

1. Issue an order to show cause;
2. Appoint counsel to represent petitioner in any and all proceedings in this matter.
3. Conduct an evidentiary hearing;
4. Order respondents to provide petitioner with reasonable discovery;
5. Declare the rights of the petitioner;
6. Grant any other further relief the court deems proper and just.

Date: 3-23-07

Respectfully, submitted



Santiago Montenegro

1
2 IX.
34
5 MEMORANDUM OF POINTS AND AUTHORITIES
67
8 THE LAW ON PAROLE
9

10 Penal Code section 3041, subdivision (a) requires that at a
11 suitability hearing the board "shall normally set a parole release
12 date...Subdivision (b) provides that a release date "shall" be set
13 "unless" the Board determines that the gravity of the current convicted
14 offense or offenses, or the timing and gravity of current or past
15 convicted offense or offenses, is such that consideration of public
16 safety requires a more lengthy period of incarceration for this indi-
17 vidual...See, e.g., In re Rosenkrantz, 29 Cal.App. 4th 616, at 653,
18 (2002), citing to In re Ramirez, 94 Cal. App. 4th 549, at 565. The
19 parole board regulations make this criterion more specific. The panel
20 can deny only if the prisoner would pose an unreasonable risk of da-
21 nger to society if released from prison. (Cal. Code Regs., tit 15,
22 2402, subd (a). The regulations set forth specific criteria to deter-
23 mine whether under the standard a prisoner is suitable for parole.

24 Under the rule created by the United States Supreme court in
25 Greenholtz v. Inmates of Nebraska Penal (1979) 442 U.S. 1,12, and
26 Board of Pardons v. Allen (1987) 482 U.S. 369, 377-378, a state's
27 statutory parole scheme which used mandatory language "creates a pre-
28 sumption that parole will be granted" when or unless certain designa-
ted findings are made, and therefore gives rise to a constitutional
liberty interest. The California parole scheme uses mandatory language
which is parallel to the parole scheme found in Greenholtz and Allen

1 to give rise to a protected liberty interest in parole. Accordingly,
 2 the California parole scheme gives rise to a cognizable liberty in-
 3 terest in release on parole. See also, McQuillion v. Duncan, 306 F.3d
 4 895, 902 (9th Cir. Cal.2002); and Biggs v. Terhune, 334 F.3d 910
 5 (9th Cir. Cal. 2003), affirming these propositions in California's
 6 section 3041, penal code. Following on the heels of McQuillion, *supra*,
 7 the siminal case of *In re Rosenkrantz* held that the statutory parole
 8 scheme creates a liberty interest under California due process of law.
 9 *Id.*, at 29 Cal. 4th at 668, fn.12. The court then applied the clearly
 10 established federal due process test to review a gubernatorial dec-
 11 ision to deny parole. It recognized that a gubernatorial decision is
 12 subject to judicial review to determine whether there is "some evid-
 13 ence" to support the decision. In this case, the decision by the Board
 14 to find petitioner unsuitable for parole is also subject to review to
 15 determine if there is some evidence to support the decision, the ev-
 16 idence must bear some indicis of reliability, *Cato v. Rushen*, 824 F.
 17 2d 703, 705 (9th Cir. Cal. 1987); also, *Jancsek v. Oregon Board of*
 18 *Parole*. 833 F. 2d. 1389, 1390. (9th Cir. 1987). The evidence must be
 19 relevant and material to the decision. (Cal. Code Regs., 15. 2000. (b)
 20 (50) Good Cause; (63) Material Evidence, (90) Relevant Evidence (*Ibid.*
 21 (50) Good Cause: A finding by the board based upon a preponderance of
 22 the evidence that there is a factual basis and good reason for the
 23 decision made. Evidence which tends to prove or disprove an issue or
 24 facts in dispute. *In re Caswell*, 92 Cal. App. 4th 1017, 1030; *McQuillion*
 25 *supra*, 306F.3d at 906,910.

26 A. THE DECISION TO FIND PETITIONER UNSUITABLE FOR
 27 PAROLE IS AN ABUSE OF DISCRETION AND VIOLATES DUE
 28 PROCESS; PETITIONER MUST BE GRANTED A PAROLE DATE.

1 1. THE DECISION IS NOT SUPPORTED BY ANY RELEVANT OR
2 MATERIAL EVIDENCE.

3 Proceeding under the presumption that the evidence must be rel-
4 evant and material, there was no relevant or material evidence to ba-
5 se denial of parole to petitioner. Under federal due process analysis,
6 after finding a liberty interest, it must be determined what process
7 is due. Morrissey v. Brewer (1972) 408 U.S. 471,481. In this context,
8 the United States Supreme Court has held that there must be "some ev-
9 idence" Superintendent v. Hill (1985) 472 U.S. 445,456, where it sta-
10 tes that "the fundamental fairness guaranteed by the due process clause
11 does not require courts to set aside decisions of prison administra-
12 tors that have some basic fact."

13 Additionally, the evidence underlying the Board's decision must
14 have some indicia of reliability. Jancsek, supra 833 F. 2d at 1390.
15 In this case, petitioner contends that the Board of Parole Hearings
16 erroneously concluded there is some evidence to justify the finding
17 that he is suitable for parole.

18

19 (a). THE COMMITMENT OFFENSE DOES NOT CONSTITUTE "SOME
20 EVIDENCE" FOR DENIAL OF PAROLE IN THIS CASE.

21 In finding petitioner unsuitable for parole the panel stated
22 that the commitment offense was carried out in an especially vicious
23 and brutal manner. Additionally, the motive of this crime was inexp-
24 licable and trivial in relationship to the offense. Moreover, the off-
25 ense was carried out in a manner which demonstrates exceptional insen-
26 sitive disregard for human suffering. Such a finding is contrary to the
27 facts of the case, where the record indicates petitioner would pose a

1 low degree of risk to society if he were released from prison at this
 2 time. It could be argued that any and all murders are carried out in
 3 a vicious, brutal manner without regard to human suffering. and in
 4 fact is what second degree murder is. But used as a regulation for
 5 unsuitability would have to denote something greater than an ordinary
 6 or typical killing. Nonetheless, as the psychological evaluation re-
 7 port clearly demonstrates, petitioner has made substantial and signif-
 8 icant progress in growth and maturation while incarcerated. The record
 9 is replete with his achieving the correctional objectives of reforming
 10 his life, and it would be a disservice to the professionalism and pro-
 11 grams of the Department to devalue petitioner's officially-recognized
 12 progress and deny him parole because he committed the offense. Despite
 13 this offense, he was sentenced to a parolable sentence. Certainly, his
 14 case falls within the meaning expressed in Ramirez,*supra*, that any
 15 murder is parolable under the statute. Yet, the panel made no effort
 16 to distinguish his offense as containing circumstances which are be-
 17 yond the minimum necessary to sustain a conviction for the crime of
 18 second degree murder.

19

20 2. THE BOARD'S BOILERPLATE RELIANCE ON STATIC HISTORY
 FACTORS VIOLATES FUNDAMENTAL DUE PROCESS.

21

22 The Ninth Circuit has expressed concern about the use of the
 23 commitment offense to repeatedly deny parole. As the circuit in Biggs
 24 v. Terhune (9th Cir. 2003) 334 F. 3d 910, 916, recently acknowledge:
 25 "Due process is not a mechanical instrument. It is a process. It is
 26 a delicate process of adjustment inescapably involving the exercise of
 27 judgment by those whom the constitution has entrusted with the unfold-
 28 ing of the process. "Lankford v. Idaho 500 U.S. 110,121 (1991) (quoting

1 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951)
2 (Frankfurter, J., Concurring). A continued reliance in the future on an
3 unchanging factor, the circumstances of the crime... runs contrary to
4 the rehabilitative goals espoused by the prison system and could re-
5 sult in a due process violation. See also, In re Rosenkrantz, supra,
6 29 Cal. 4th at 689 (Moreno, J., concurring). (Emphasis added). Biggs
7 was denied at his first initial parole hearing. The Circuit allowed
8 that the commitment offense could be used at that initial hearing as
9 a legitimate cause for denial of parole, but questioned whether it
10 could be used as a factor to continue denying parole at subsequent
11 hearings. At first blush, the use of the offense in the petitioner's
12 case at his initial hearing might have been upheld as "some evidence".
13 but the hearing challenged here is his (2nd) subsequent hearing. The
14 Biggs court gave clear indication that had it been Biggs subsequent
15 hearing, the court may have found against the Board on using the off-
16 ense to again base parole denial on.

17 When considering the offense as circumstances for unsuitability
18 the Board must be and should be mindful that the circumstances of the
19 offense are static and unchangeable. The most important aspect of this
20 case is the dynamic changes that years of imprisonment and exposure to
21 positive, behavioral programs has made in this petitioner. The record
22 shows that he has achieved the objective of corrections, i.e., to cor-
23 rect behavior, and the record shows official and professional recog-
24 nition that he does not pose an unreasonable risk to public safety if
25 paroled. Thus, since there is no evidence whatsoever of unreasonable
26 risk, which is the standard by which the Board's decision legally hi-
27 nges, the Board's decision denying petitioner parole must be reversed.
28 The statutory default must be enforced in this case.

1 3. THE BOARD'S STATEMENT OF REASON WAS INADEQUATE.

2 The Board's statement of reasons were inadequate and inappropri-
3 ate. In In re Strum (1974) 11 Cal. 3d 258, 113 Cal. Rptr. 361, 521.
4 P. 2d 97. The California Supreme Court held that in order to comply
5 with a prisoner's due process rights, the Board must "support all its
6 denials of parole with a written definitive statement of its reasons
7 therefore and to communicate such statements to the inmate concerned".
8 (Id., at P. 273.) The Strum court articulated three rationales as to
9 why the Board must provide a written statement of reasons granting pa-
10 role: (1) to promote careful decision making; (2) to allow inmates to
11 make an informed application for relief if parole is denied; and (3)
12 to permit meaningful judicial review. (Id., at P. 270.) Other courts
13 have taken similar positions where judges have failed to adequately
14 articulate their findings. See People v. Martin (1986) 42 Cal. 3d 905,
15 913-915, and cases cited. In Martin the court said, citing several ca-
16 ses, such as In re Podesta (1976) 15 Cal. 3d 921, that
17

18 "we emphasized that a requirement of articulated reasons
19 to support a given decision serves a number of interests;
20 it is frequently essential to meaningful review; it acts
21 as an inherent guard against careless decisions, insuring
22 that the judge himself analyzes the problem and recognizes
23 the grounds for his decision-making process by helping to
24 persuade the parties and the public that the decision-mak-
25 ing is careful, reasoned and equitable". (Ibid.)

26 Here, the Board's statement of reasons is cryptic at best. It
27 merely recites the commitment offense as the primary basis upon which
28 it denied parole and lists pro forma boilerplate terminology from its
Parole Denial Worksheet/Fm. 1000A. It does not explain what it is about
the commitment offense and its inclusive aggravating circumstances
that make the petitioner an "unreasonable risk of danger to society if

1 released". (see section 2402, subd. (a).) or how the commitment offe-
 2 nse was "particularly egregious". It did not explain how all the evi-
 3 dence supporting petitioner's suitability for parole, including all
 4 the psychological clearances, and lack of any violent criminal history
 5 did not outweigh under the ordinary rules of the "perponderance of
 6 evidence" standard employed by the Board's regulations (see section
 7 2000 (b), (50) - the static history of the commitment offense. There-
 8 fore, the Board's abused its discretion in violation of procedural due
 9 process by failing to properly apply its own burden of proof.

10 The Court is not here asked to substitute its judgment for that
 11 of the Board, nor is it asked to weigh or reweigh the evidence. Rather,
 12 the court is asked to review de novo the pre-decisional process of the
 13 hearing, including the evidence submitted, determined the legal sign-
 14 ificance of that evidence as relevant or irrelevant, and then determine
 15 if the Board met its own standard of proof in weighing and balancing
 16 process.

17 4. THE DECISION TO DENY PETITIONER PAROLE WAS ARBITRARY
 18 AND AN ABUSE OF DISCRETION, UNSUPPORTED BY "SOME EVID-
 19 ENCE, "VIOLATING HIS RIGHT TO DUE PROCESS GUARANTEED
 20 BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTIT-
 21 UTION OF THE UNITED STATES.

22 Although the Board of Parole Hearings (hereafter Board) discret-
 23 ion in parole matters has been described as "broad", it is not absolu-
 24 te (In re Powell (1988) 45 Cal. 3d 894, 940), as its discretion is
 25 "cabined" by criteria, in petitioner's case, listed in the California
 26 Code of Regulations, title 15 § 2402 McQuillion v. Duncan (9th Cir.
 27 2003) 306 F. 3d 895, 912). Petitioner has not only a liberty interest
 28 in parole (In re Rosenkrantz (2002) 29 Cal. 4th 616, 652) but an ex-
 pectation that [he] will be granted parole unless the Board finds in

1 the exercise of its discretion that [the prisoner is] unsuitable for
 2 parole in light of the circumstances specified by statute and by the
 3 regulations (Ibid. at 654, emphasis added). Petitioner's liberty inter-
 4 est in and "expectation" of parole, does not attach upon being found
 5 suitable for parole , but upon entrance of prison gates (Biggs v. Ter-
 6 hune '(9th) Cir. 2003) 334 F. 3d 910,915). A decision of unsuitability
 7 for parole must be supported by some evidence having some indicia of
 8 reliability (Ibid., Citation). There must also be a rational connection
 9 between the evidence and the decision made; if not the decision is ar-
 10bitrary and an abuse of discretion, violating the due process clause
 11 (Guidotti v. County of Yolo (1989) 214 Cal. App. 3d 1552,1561; Oregon
 12 Resource Council v. Lowe (9th Cir. 1997) 109 F. 3d 521,526).

13 As will be demonstrated, the decision to deny petitioner parole
 14 for the 2nd time, is not supported by "some evidence" and is therefore
 15 an abuse of discretion, violating his right to due process. (Rosenkran-
 16 tz v. Marshall, 444 F. Supp. 2d 1063. C.C Cal. (2006) U.S. Dist. Lexis
 17 79358; (Martin v. Marshall, 431 F. Supp. 2d 1038 (N.D. Cal. 2006).
 18 Petitioner's case is exactly what Biggs envision when it stated that
 19 repeated refusals to grant a parole release date to an inmate with an
 20 exemplary post-conviction record may violate the prisoner's due proc-
 21 ess rights Biggs, 334 F.3d at 916. The record in this case is replete
 22 with evidence of petitioner's remorse and rehabilitation, including
 23 glowingly positive psychological reports. (see petitioner's exhibit 3
 24 at pp. 4-6). As detailed above, every psychologist and correctional
 25 counselor who has evaluated petitioner has concluded that petitioner
 26 would pose no significant risk of danger if released. Regardless of
 27 whether the BPH's ever was entitled to rely upon the commitment off-
 28 ense to find that petitioner posed an unreasonable risk of danger and

1 was unsuitable for parole , in the exceptional circumstances presented
 2 by this case, the BPH's continued reliance on the commitment offense
 3 violates due process because it resulted in an arbitrary decision and
 4 because the facts surrounding the offense do not now constitute "some
 5 evidence" possing "some indicia of reliability" that petitioner pose
 6 a danger to the community. See Hill, 472 U.S. at 455; Biggs, 334 F. at
 7 917; Irons, 358 F. Supp. 2d at 947; Masoner v. State, 2004 U.S. Dist.
 8 Lexis 9221, 2004 WL 1080177, at *1-2 (C.D.Cal. 2004).

9

10 ARGUMENTS

11 a. THE COMMITMENT OFFENSE FOR THE SECOND TIME IS NOT
 12 "SOME EVIDENCE" UPON WHICH PAROLE CAN BE DENIED.

13 Petitioner's second parole hearing was held on August 16, 2006.
 14 Presiding Commissioner, James Davis states: This hearing is being co-
 15 ducted pursuant to Penal Code Section 3041 and 3042 and the rules and
 16 regulations of the Board of Prison Terms governing parole considera-
 17 tion hearings for life inmates. (HT 7). In closing the commissioner
 18 concluded there were Two reasons why this petitioner is not suitable
 19 for parole and would pose would pose an unreasonable risk to society
 20 or a threat to public safety if released from prison. (1). The offense
 21 was carried out in an especially callous manner, and (2). The motive
 22 for the offense was very trivial in relation to the offense. (HT 33).

23 The relevant evidence does not merely fail to support but re-
 24 futes the conclusion that the petitioner committed his offense in a
 25 especially callous maner.

26 b. THE MANNER IN WHICH PETITIONER COMMITTED HIS OFFENSE
 27 DOES NOT DEMONSTRATE AN ESPECIALLY CALLOUS MANNER

1 "[A]ll second degree murders by definition involve some callousness--
 2 i.e., lack of emotion or sympathy, emotional insensitivity, indifference
 3 to feelings and suffering of others. [Citation.] As noted, however,
 4 parole is the rule, rather than the exception, and a conviction
 5 for second degree murder does not automatically render one unsuitable."
 6 (In re Smith (2003) 114 Cal. App. 4th 343, 366 [7 Cal. Rptr. 3d 655],
 7 italics omitted.) In re Ramirez, supra, 94 Cal. App. 4th 549, as in
 8 this case, the Board denied a parole release date on the basis of a
 9 finding that the nature of the inmates offense displayed a "callous
 10 disregard for human suffering." (Id. at pp. 558, 568.) Setting aside
 11 that determination, the court agreed that "the gravity of the commitment
 12 offense or offenses alone may be a sufficient basis for denying
 13 a parole application, so long as the Board does not fail to consider
 14 all other relevant factors," (id. at p. 569), but attached an important
 15 caveat. As the court explained, "[a]ll violent crime demonstrates
 16 the perpetrator's potential for posing a grave risk to public safety,
 17 yet parole is mandatory for violent felons serving determinate sentences.
 18 (Pen. Code, § 3000, subd. (b) (1)."

19 Under the Board regulations, base terms for life prisoners are
 20 not calculated until after an inmate is deemed suitable for release.
 21 (§ 2282, subd. (a).) The regulations therefore contemplate that an
 22 inmate may be deemed suitable for release even though his offense
 23 demonstrated "exceptionally callous disregard for human suffering."
 24 (§ 2402, subd. (c) (1) (D).)

25 Because the relevant evidence shows no more callous disregard
 26 for human suffering than is shown by most second degree murder offenses,
 27 the Board's use of this factor to conclude that petitioner committed his offense "in an especially cruel and callous manner" was

1 arbitrary and capricious. Examined in light of the record, the Board's
 2 explanation of why petitioner is not suitable for release from prison
 3 is revealed as no more than the mouthing of conclusionary words. The
 4 reliable factual underpinning that is constitutionally required cannot
 5 be shown (see McQuillion v. Duncan (9th Cir. 2002) 306 F. 3d 895,902;
 6 In re Caswell (2001) 92Cal. App. 4th 1017,1027, [112 Cal. Rptr. 2d 462]
 even under the exceptional deferential standard of review.

8 This is petitioner's second suitability hearing in which the
 9 board relied upon unchanging factors to deny petitioner a parole date.
 10 The Ninth Circuit has held that California's parole scheme creates a
 11 cognizable liberty interest in release on parole because Penal Code §
 12 3041 uses mandatory language and is similar to the Nebraska and Montana
 13 statutes addressed in Greenholtz and Allen, respectively. McQuillion,
 14 306 F.3d at 901-902. As the Ninth Circuit has explained, "Section 3041
 15 of the California Penal Code creates in every inmate a cognizable lib-
 16 erty interest in parole which is protected by the procedural safeguards
 17 of the Due Process Clause, and that interest arises upon the incarcera-
 18 tion of the inmate. Biggs v. Terhune, 334 F.3d 910, 914-915 (9th Cir.
 19 2003). Petitioner has now served 15 years on his sentence, under these
 20 circumstances, the nature of the offense has lost any predictive value
 21 and continued reliance on it to find petitioner unsuitable violated
 22 due process. (Bair v. Folsom State Prison 2005 U.S. Dist. Lexis 29952
 23 (E.D. Cal. 2005). The Biggs Court held, in relevant part:

24 [The] parole board's sole supportable reliance on the
 25 gravity of the offense and conduct prior to imprisonment
 26 to justify denial of parole can be initially justified
 27 as fulfilling the requirements set forth by the state.
 Over time, however, should Biggs continue to demonstrate
 exemplary behavior and evidence of rehabilitation, denying
 him a parole date simply because of the nature of Biggs
 offense and prior conduct would raise serious questions

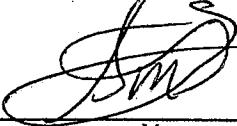
1 involving his liberty interest in parole. A continued re-
2 liance in the future on unchanging factor, the circumstances
3 of the offense and conduct prior to imprisonment runs con-
4 trary to the rehabilitative goals espoused by the prison sys-
5 tem. (Biggs v. Terhune, supra, 334 F.3d at 916-917).

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CONCLUSION

15 When the court applies the same evidence standard as properly
16 understood to the circumstances of Santiago Montenegro, the court will
17 find that the Board's decision was not based on some relevant reliable
18 evidence that reasonably suggest that he poses a current, unreasonable
19 threat to public safety. For these reasons, the petitioner respect-
20 fully request that this court vacate the Board's determination of un-
21 suitability and direct the Board to set a parole date for the Petition-
22 ner.

23 Date: 3-23-07

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27
28


Santiago Montenegro

1 DECLARATION OF SANTIAGO MONTENEGRO
2
3

4 I declare as follows:
5
6

7 I am the petitioner in this case. I am over the age of eighteen years.
8 I am a party to the attached action. I am a resident of the Correct-
9 ional Training Facility in Soledad, California. My address is Post
10 Office Box 705/ND-12-L / CTF North Facility / Soledad, California. 93960-
11 0705. I served the attached document entitled "Writ Of Habeas Corpus".
12 on the persons/parties specified below by placing a true copy of said
13 document into a sealed envelope with the appropriate postage affixed
14 thereto and surrendering said envelope to the following:
15
16

17 OFFICE OF THE ATTORNEY GENERAL
18 300 South SPRING STREET
19 LOS ANGELES, CA. 90013
20
21
22

23 I declare under penalty of perjury under the laws of the United
24 States that the foregoing is true and correct. Executed this 23
25 day of March. 2007 at the Correctional Training Facility
26 in Soledad, California.
27
28


24
25
26
27
28

Declarant

EXHIBIT 1

SUBSEQUENT PAROLE CONSIDERATION HEARING
STATE OF CALIFORNIA
BOARD OF PAROLE HEARINGS

In the matter of the Life)
Term Parole Consideration) CDC Number H-55090
Hearing of:)
)
SANTIAGO MONTENEGRO)
)

CORRECTIONAL TRAINING FACILITY

SOLEDAD, CALIFORNIA

AUGUST 16, 2006

PANEL PRESENT:

JAMES DAVIS, Presiding Commissioner
NOREEN BLONIEN, Deputy Commissioner

OTHERS PRESENT:

SANTIAGO MONTENEGRO, Inmate
PATRICK SPARKS, Attorney for Inmate
LYNN CUTLER, Prosecutor
JOSE ZAVALA, Spanish Interpreter
ED MARTINEZ, Commissioner/Observer
Two Correctional Officers, Unidentified

**INMATE
COPY**

CORRECTIONS TO THE DECISION HAVE BEEN MADE

 No See Review of Hearing
 Yes Transcript Memorandum

Don Larson -- Vine, McKinnon & Hall

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P R O C E E D I N G S

2 **PRESIDING COMMISSIONER DAVIS:** This is a Subsequent
3 Parole Consideration Hearing for Santiago Montenegro,
4 CDC number H-55090. And before we get started, we do
5 have an interpreter with us today, so I will go ahead
6 and swear you in, sir. Raise your right hand, do you
7 solemnly swear to translate from English to Spanish and
8 from Spanish to English to the best of your ability
9 accurately?

10 **INTERPRETER ZAVALA:** I do.

11 **PRESIDING COMMISSIONER DAVIS:** Thank you. Today's
12 date is August 16th, 2006. We're located at the
13 Correctional Training Facility in Soledad. The inmate
14 was received on November 6th, 1992, from Santa Barbara
15 County, the life term beginning on January 23rd, 1993,
16 with a minimum eligible parole date of January 24th,
17 2003. The controlling offense for which the inmate has
18 been committed is murder second with a weapon, case
19 number SN073860 -- 867, excuse me, better repeat that,
20 SN073867 -- count 1, Penal Code Section 187 second slash
21 12022.5 paren (a). The inmate received a term of 15
22 years to life plus two. This hearing is being tape
23 recorded, and for the purposes of voice identification,
24 we will each state our first and last name, spelling the
25 last name, and when it reaches you, Mr. Montenegro, if
26 you also will give us your CDC number, please, sir. So
27 I will start and move to my left, I'm James Davis,

1 D-A-V-I-S, Commissioner.

2 **DEPUTY COMMISSIONER BLONIEN:** I'm Noreen Blonien,
3 B-L-O-N-I-E-N. I'm a Deputy Commissioner.

4 **ATTORNEY CUTLER:** I'm Lynn Cutler, C-U-T-L-E-R. I'm
5 the prosecutor.

6 **ATTORNEY SPARKS:** Patrick Sparks, S-P-A-R-K-S,
7 attorney for Mr. Montenegro.

8 **INMATE MONTENEGRO:** Santiago Montenegro, S, S, S ...

9 **PRESIDING COMMISSIONER DAVIS:** Just your last name
10 for spelling.

11 **INMATE MONTENEGRO:** Montenegro, M-O-N-T-E-N-E-G-R-O,
12 H-5590 (verbatim).

13 **INTERPRETER ZAVALA:** Jose Zavala, Z-A-V-A-L-A,
14 Spanish interpreter.

15 **COMMISSIONER MARTINEZ:** Ed Martinez, M-A-R-T-I-N-E-Z
16 Commissioner/Observer.

17 **PRESIDING COMMISSIONER DAVIS:** We want the record
18 also to reflect we're joined by two correctional
19 officers here today, who will not be joining us, for
20 security purposes only, and will not be actively
21 participating in this hearing. Mr. Zavala, if you will
22 read this Americans with Disabilities Act statement,
23 please, in Spanish.

24 **INTERPRETER ZAVALA:** [ADA statement read in
25 Spanish.]

26 **PRESIDING COMMISSIONER DAVIS:** According to our
27 records, on February 14th, 2006, together with staff in

1 the institution, you reviewed and signed a BPT Form
2 1073, indicating that you do not have any disabilities
3 that would qualify under the Americans with Disabilities
4 Act; however, you do need a Spanish interpreter, which
5 of course, is why Mr. Zavala is here today. Has
6 anything changed since that time, sir?

7 **INMATE MONTENEGRO TRHOUGH INTERPRETER:** No.

8 **PRESIDING COMMISSIONER DAVIS:** All right, very well.
9 And did you have an interpreter with you when you
10 reviewed your C-File?

11 **INMATE MONTENEGRO TRHOUGH INTERPRETER:** Yes.

12 **PRESIDING COMMISSIONER DAVIS:** All right. And for
13 the psychological examination, which you took in 2002?

14 **INMATE MONTENEGRO TRHOUGH INTERPRETER:** Yes.

15 **PRESIDING COMMISSIONER DAVIS:** All right, very well.
16 You're able to hear us all right?

17 **INMATE MONTENEGRO TRHOUGH INTERPRETER:** Yes.

18 **PRESIDING COMMISSIONER DAVIS:** And you made it here
19 today under your own power? You're able to walk here?

20 **INMATE MONTENEGRO TRHOUGH INTERPRETER:** Yes.

21 **PRESIDING COMMISSIONER DAVIS:** All right. Is there
22 any reason that you can think of why you would not be
23 able to actively participate in this hearing today?

24 **INMATE MONTENEGRO TRHOUGH INTERPRETER:** Excuse me?

25 **PRESIDING COMMISSIONER DAVIS:** Is there any
26 reason -- anything that you can think of that would
27 preclude you from actively participating in this hearing

1 today?

2 INMATE MONTENEGRO THROUGH INTERPRETER: No.

3 PRESIDING COMMISSIONER DAVIS: All right, very well.

4 Counsel, you're satisfied with that as well?

5 ATTORNEY SPARKS: Yes.

6 PRESIDING COMMISSIONER DAVIS: All right. Thank
7 you. This hearing is being conducted pursuant to Penal
8 Code sections 3041 and 3042 and the rules and
9 regulations of the Board of Prison Terms governing
10 parole consideration hearings for life inmates. The
11 purpose of today's hearing is to once again consider the
12 number and nature of the crimes for which you were
13 committed, your prior criminal and social history, and
14 your behavior and programming since your commitment.

15 We've had the opportunity today to review your Central
16 File and your prior transcript, and you will be given
17 the opportunity to clarify the record as we proceed. We
18 will reach a decision today and inform you of whether or
19 not we find you suitable for parole and the reasons for
20 our decision. If you are found suitable for parole, the
21 length of your confinement will be explained to you.

22 Nothing that happens here today will change the findings
23 of the court. The Panel is not here to retry your case,
24 the Panel is here for the sole purpose of determining
25 your suitability for parole. Do you understand that,
26 sir?

27 INMATE MONTENEGRO THROUGH INTERPRETER: Yes.

1 PRESIDING COMMISSIONER DAVIS: Thank you. This
2 hearing will be conducted in basically two phases, first
3 I will discuss with you the crime for which you were
4 committed, as well as your prior criminal and social
5 history; and Commissioner Blonien will then discuss with
6 you your progress since your commitment, your
7 counselor's report, psychological evaluation, parole
8 plans, and any literature of support or opposition as
9 they may exist. Once that is concluded, the
10 prisoners -- the Commissioners, excuse me -- and the
11 District Attorney, and your attorney will have an
12 opportunity to ask you questions. Questions that come
13 from the District Attorney will be asked through the
14 Chair, and you will respond back to the Panel with your
15 response. Next, the District Attorney and then your
16 attorney will be given an opportunity to make a final
17 closing statement and then followed by your closing
18 statement. Your closing statement should focus on your
19 suitability for parole. The California Code of
20 Regulations states that regardless of time served, an
21 inmate shall be found unsuitable for and denied parole
22 if, in the judgment of the Panel, the inmate would pose
23 an unreasonable risk of danger to society if released
24 from prison. And now you have certain rights, those
25 rights include the right to a timely notice of this
26 hearing, the right to review your Central File, and the
27 right to present relevant documents. Counsel, are you

1 satisfied your client's rights have been met to date?

2 ATTORNEY SPARKS: Yes.

3 PRESIDING COMMISSIONER DAVIS: Thank you. You have
4 an additional right, and that is to be heard by an
5 impartial panel. Now you've heard your panel introduce
6 themselves this morning, is there any reason for you to
7 believe that we would not be impartial?

8 INMATE MONTENEGRO THROUGH INTERPRETER: (Inaudible).

9 PRESIDING COMMISSIONER DAVIS: Thank you. You will
10 receive a written copy of our tentative decision today.
11 That decision becomes effective in 120 days. A copy of
12 the decision and a copy of the transcript will be sent
13 to you. The Panel -- the Board -- has eliminated its
14 appeal process; if you disagree with anything in today's
15 hearing, you have the right to go directly to court with
16 your complaint. You are not required to admit your
17 offense or discuss your offense; however, once again,
18 the Panel does accept the findings of the court to be
19 true. Do you understand that, sir?

20 INMATE MONTENEGRO THROUGH INTERPRETER: Yes.

21 PRESIDING COMMISSIONER DAVIS: Okay. Commissioner,
22 are we going to be dealing with anything from a
23 confidential file today?

24 DEPUTY COMMISSIONER BLONIEN: There's no
25 confidential information.

26 PRESIDING COMMISSIONER DAVIS: All right. Then I'm
27 going to pass a checklist and documents to both counsel,

1 if you'll take a look at that to make sure we're all
2 operating off the same list of documents. The
3 prosecution, do you have those documents as well?

4 **ATTORNEY CUTLER:** Yes.

5 **PRESIDING COMMISSIONER DAVIS:** All right. Then
6 we'll mark that Exhibit 1. Counsel, anything additional
7 you would like us to consider today?

8 **ATTORNEY SPARKS:** No, thank you.

9 **PRESIDING COMMISSIONER DAVIS:** All right. Any
10 preliminary objections?

11 **ATTORNEY SPARKS:** No.

12 **PRESIDING COMMISSIONER DAVIS:** All right. Will your
13 client be speaking with us today?

14 **ATTORNEY SPARKS:** Yes, but he won't be talking about
15 the crime.

16 **PRESIDING COMMISSIONER DAVIS:** All right. If there
17 are no other matters -- if you'll raise your right hand.
18 Do you solemnly swear or affirm that the testimony you
19 will give at this hearing will be the truth and nothing
20 but the truth?

21 **INMATE MONTENEGRO:** Yes.

22 **PRESIDING COMMISSIONER DAVIS:** All right, thank you.
23 For a summary of the crime, I'm going to refer to the
24 probation officer's report starting on page 2 under the
25 heading of offense. It starts on the first paragraph,
26 where it states that:

27 "On November 13th, 1985, Santa Maria police

1 officers responded to El Conquistador Bar at
2 210 South Bloosser, B-L-O-O-S-S-E-R,
3 Santa Maria, to investigate a shooting.
4 Officers found Antonio Hernandez Cardona,
5 C-A-R-D-O-N-A, age 22, slumped in the right
6 front passenger's seat of an automobile.
7 Officers observed a gunshot wound into the
8 front of his neck. An ambulance was called and
9 he was taken to Maria Medical Center, where he
10 died at 2315 hours. Doctors concluded the
11 victim died as a result of a gunshot wound to
12 the anterior neck slash chest, exiting through
13 the back. A second entry wound in the left
14 shoulder revealed a .44 caliber bullet. The
15 victim was shot three times. Investigations
16 revealed the victim was the alleged boyfriend
17 of Lilliana Beltran, B-E-L-T-R-A-N, and they
18 had been inside the El Conquistador Bar.
19 Ms. Beltran left the bar and went outside to
20 the victim's car. The defendant followed
21 Ms. Beltran out to the car, sat down in the
22 car, and tried to kiss her. The victim came
23 out of the bar with two friends, saw what was
24 going on, and pulled the defendant out of the
25 car. The victim and defendant verbally argued.
26 The defendant pulled a .44 Magnum pistol from
27 his waistband and fired three or four shots.

1 into the victim. The defendant fled the area.
2 The defendant told officers upon his arrest he
3 had hidden in a cardboard box in an alley until
4 daylight, had been in Reedley, California, and
5 had gone on to Mexico, and for the past three
6 years had been living in Guadalupe."

7 Under prisoner's version, as listed in the June 2002
8 Board Report, it states that in an interview for the
9 Montenegro -- an interview for this report, Montenegro
10 indicated that his previous interview with staff
11 psychiatrist Cheema, C-H-E-E-M-A, on 1/16/96, he
12 indicated that his present version remained the same.
13 Montenegro stated that he was involved in a fight with
14 an unknown --

15 **DEPUTY COMMISSIONER BLONIEN:** Just a question.

16 Mr. Sparks, you're aware that in the '02 psych report
17 there's a different version.

18 **ATTORNEY SPARKS:** Well, there's probably three
19 versions total.

20 **DEPUTY COMMISSIONER BLONIEN:** Right.

21 **ATTORNEY SPARKS:** So, I'm not sure which one you
22 want to refer to ...

23 **PRESIDING COMMISSIONER DAVIS:** Well, we're going to
24 refer to all the ones that we have, actually, so we'll
25 have this and plus --

26 **DEPUTY COMMISSIONER BLONIEN:** They're very --

27 **PRESIDING COMMISSIONER DAVIS:** -- we have the psych

1 that we're going to --

2 **DEPUTY COMMISSIONER BLONIEN:** They're very
3 conflicting, and I don't know if he understood when he
4 talked to his counselor and referred to the psych
5 report, he really meant the '96 psych report where he
6 said he had no responsibility, or the '02 psych report
7 where he took full responsibility. And so since this is
8 only his first hearing, for Subsequent Hearing, I know
9 you want the record clear.

10 **ATTORNEY SPARKS:** His statement to me was that he
11 shot the victim.

12 **DEPUTY COMMISSIONER BLONIEN:** So that's in the '02
13 psych report. I believe in the '96 psych report he said
14 he did not.

15 **PRESIDING COMMISSIONER DAVIS:** Why don't we do this,
16 we'll go ahead and go through this part of this, that
17 will give us at least a chronology for now, and when we
18 get to this part of it, and then when we get to the
19 psych report, we'll cover that as well.

20 **DEPUTY COMMISSIONER BLONIEN:** Okay.

21 **PRESIDING COMMISSIONER DAVIS:** So we'll have
22 (inaudible). Is there a third?

23 **ATTORNEY SPARKS:** Maybe, but not right now.

24 **PRESIDING COMMISSIONER DAVIS:** All right. So we'll
25 have at least everything on the record for this time,
26 and then we'll get it from there.

27 **ATTORNEY SPARKS:** Okay.